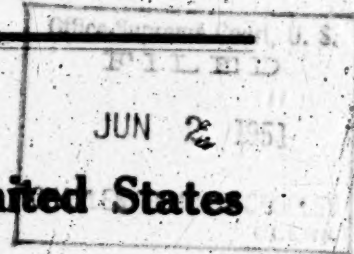


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IN THE

**Supreme Court of the United States**

**October Term, 1950**

**No. 442**

**SCHWEGMANN BROTHERS, ET AL.,**  
*Petitioners,*  
*versus*

**CALVERT DISTILLERS CORPORATION,**  
*Respondent,*  
**AND**

**No. 443**

**SCHWEGMANN BROTHERS, ET AL.,**  
*Petitioners,*  
*versus*

**SEAGRAM-DISTILLERS CORPORATION,**  
*Respondent.*

**RESPONDENTS' PETITION FOR REHEARING**

**EZRA CORNELL,**  
**THOMAS KIERNAN,**  
**EDGAR E. BARTON,**  
**J. BLANC MONROE,**  
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**WALTER J. SUTTON, JR.,**  
*Attorneys for Respondents.*

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**RESPONDENTS' PETITION FOR REHEARING**

Calvert Distillers Corporation and Seagram-Distillers Corporation respectfully pray that the Court grant a rehearing of its judgment entered on May 21, 1941 in the above entitled and numbered cases, on the following grounds, to-wit:

(1) The Court in arriving at its decision in this case gave insufficient consideration to the fact that the requirement that non-signers comply with minimum prices established by fair trade contracts is imposed by State law rather than by contract of private parties.

The only action taken by the respondents in the instant case was the execution of fair trade contracts clearly and definitely legalized by the Miller-Tydings Amendment. There is not one scintilla of evidence in the record which shows that the respondents entered into any combination or conspiracy with anyone. The respondents did not conspire with Schwegmann Brothers and the only other action taken was the application for an injunction to the United States District Court. It was not any combination or conspiracy between respondents and anyone else which required petitioner to comply with minimum retail resale prices established under the authorized fair trade agreements. It was action of the State in creating the tort of unfair competition for failure of non-signers of fair trade agreements to comply with the stipulated prices which required petitioner to comply.

Had Congress inserted in the Miller-Tydings Amendment an affirmative provision with respect to State law regarding non-signers it would have established the principle that the Sherman Act was applicable to state action as well as to the action of private parties.

However, in *Parker v. Brown*, 317 U. S. 341 (1943), this Court held that the Sherman Act did not restrain state action.<sup>1</sup> The statement in the opinion of the Court

<sup>1</sup> At page 351 of *Parker v. Brown*, the Court stated:

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. \* \* \* There is no suggestion of a purpose to restrain state action in the Act's legislative history."

that if Congress had intended to validate the non-signer clauses of state fair trade acts, a non-signer provision would have been included in the Miller-Tydings Act, runs, we submit, directly contrary to the holding of this Court in *Parker v. Brown*, *supra*. If Congress had enacted the Miller-Tydings Amendment with a clause permitting states to require non-signers to comply with minimum prices established by fair-trade contracts, it would have been inferable therefrom that the Sherman Act was otherwise applicable to state action whenever an express exception in favor of state action was not made. Congress was unwilling to establish that principle. But the Court has, by its decision in this case, now done so. This holding may well lead to a result which this Court did not contemplate with respect to the exercise of State power, and we submit that it should be carefully reconsidered by the Court before being allowed to stand as a final determination.

(2) The Miller-Tydings Amendment has for fourteen years been universally and officially construed to leave fully effective the Fair Trade Acts of the States, including the provisions of those acts making Fair Trade contracts binding upon non-signers. The Court's opinion strikes down the policy of the States and declares that Congress did not intend by the Miller-Tydings Amendment to validate those acts as to transactions affecting interstate commerce.

(3) In reaching this result the Court in effect contradicts the rule which it has heretofore laid down that a statute should not be construed so as to make it futile and ineffective. See *Bird v. United States*, 187 U. S. 118, 124 (1902); *Armstrong v. Nu-Enamel Corp.*, 305 U. S. 315, 332, 333 (1938); *United States v. Powers*, 307 U. S. 214, 217 (1939); *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 392 (1950); *Gemseo, Inc. v. Walling*, 324 U. S. 244,

258 (1945). The Court adds to the confusion of the profession when it ignores and departs from rules which it has previously enunciated.

(4) That the construction of the Miller-Tydings Amendment which the Court now adopts will make that statute ineffective by striking down the State Fair Trade Acts in the field of interstate commerce (the only field in which congressional action was required) has been admitted by every writer on the subject and by the petitioners themselves, who said in their brief in the Court of Appeals:

"It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon noncontracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce. \* \* \*"

See also 47 Michigan Law Review, 821; 829; 16 New York University Law Quarterly Review, 116, 117; 10 University of Pittsburgh Law Review, 443, 453; 51 Harvard Law Review 336, 344.

(5) One of the reasons assigned by the Court for its conclusion is that the enforcement of the State Fair Trade Acts against non-signers would conflict with the proviso in the Miller-Tydings Amendment prohibiting so-called "horizontal" price fixing. The argument cannot be supported. The proviso of the Amendment prohibits price-making agreements

"\* \* \* between manufacturers, or between producers, or between wholesalers \* \* \* or between retailers, or between persons, firms and corporations in competition with each other. 15 USC, §1."

The Louisiana Fair Trade Act expressly provides that it shall not apply

“to any contract or agreement between producers, or between wholesalers, or between retailers, as to sale or resale prices.”

The suggestion in the opinion that the enforcement of resale price maintenance against non-signers violates “the spirit of the proviso which forbids ‘horizontal’ price-fixing” is an obvious *non sequitur*. The conclusive demonstration that there is no clash between these two facets of resale price maintenance law is that State Fair Trade Acts generally contain both a non-signer provision and a prohibition of “horizontal” price fixing agreements.

No non-signing retailer makes any agreement. The penalty imposed by the Fair Trade Acts upon non-signers does not result from any agreement between retailers. There is no fair basis for the statement that if the Court’s construction of the Amendment is not adopted “the exception swallows the proviso and destroys its practical effectiveness”, since the proviso remains fully effective to prohibit all agreements between retailers, as well as between the other classes of persons referred to. Forty-five State legislatures have been of the opinion that this exception was sufficient for the protection of the public interest involved and it is completely unreasonable to impute to Congress an intention to strike down the results provided by the State laws.

(6) The Court’s opinion, while purporting to find support for its conclusion in the history of the Miller-Tydings Amendment, completely ignores the most important item in that history. This is the communication addressed to the President of the United States by the Chairman of the Federal Trade Commission and transmitted by the Presi-

dent as an official document to the Senate at the time that the Miller-Tydings Amendment was under consideration. In that communication the Chairman of the Federal Trade Commission urged Congress *not* to adopt the Amendment because "it would modify the anti-trust laws in differing degrees in different States" by leaving the field of resale price maintenance to be governed by State acts. In this communication the Chairman specially adverted to what he described as a "peculiar feature" of many of the State laws in that "they require wholesalers and retailers to conform to the provisions of private resale maintenance contracts to which they are not parties." The Chairman stated that the enactment of the Miller-Tydings Amendment would make these provisions binding upon interstate commerce and thus a private contract would be "made binding upon *all* dealers and the consuming public."

The President himself in his letter transmitting these observations quoted the language of the Chairman of the Federal Trade Commission, which referred to the probability that manufacturers and retailers might abuse the power to arbitrarily fix retail prices, and thereby cause resentment on the part of the consuming public during a period of rising prices.<sup>2</sup> The opinion of this Court makes

<sup>2</sup>This Court has, of course, no concern with economic questions and we have, therefore, abstained from discussing them, notwithstanding a general feeling at the Bar that these considerations do subconsciously affect the Court. We think it proper, however, to point out that forty-five State legislatures have thought that the public interest justifies the non-signer provisions of the Fair Trade Acts, notwithstanding the contention that they result in higher prices to the consumer. Some considerations may be more important than slightly higher prices to the consumer, even if such prices could be demonstrated to result in the long run, which is a matter of controversy. What reasonable basis is there to suppose that the members of Congress, which is made up of the same sort of persons who make up the State legislatures, would have any different view as to the desirability of the non-signer provisions than the members of the legislatures?

no reference whatsoever to the communication of the Federal Trade Commission. The Court apparently concludes that Congress ignored the communication and that it received no attention whatsoever. Such a conclusion would be difficult under any circumstances to maintain. But in order to maintain it the Court has also to ignore the express references which were made to this letter in the minority report of the Senate Committee, as well as in the debates upon the floor of the Senate.

The opinion of the Court also completely ignores the repeated references in the reports and debates to the decision of this Court in the *Old Dearborn* case (299 U. S. 183), in which the non-signer provisions were fully discussed and maintained as valid under the Fourteenth Amendment.

How could anyone reading these references to the communication of the Federal Trade Commission and the references to the decision of this Court in the *Old Dearborn* case have the slightest basis in reason for the conclusion that Congress did not well understand when it adopted the Miller-Tydings Amendment, that its effect would be to validate in interstate commerce the non-signer provisions of the State Fair Trade Acts?

The opinion of the Court ignores its own prior ruling that decisions of this Court called to the attention of Congress during the progress of a legislative proposal have a significant bearing upon the interpretation of the resulting enactment; see *Overstreet v. North Shore Corp.*, 318 U. S. 125, 131, 132 (1943).

(7) The opinion of the Court also ignores the statement of Senator Tydings that the purpose of the Amendment was

“to do what forty-two States have already written on their statute books. It is simply to back up those acts. That is all. . . .”

The Court now defeats the purpose thus expressed. The Court now declares that Congress failed to "back up" the State Acts and that Congress intended on the contrary to leave the State acts ineffective in all transactions affecting interstate commerce.

(8) The Court's opinion denies any weight whatsoever to the repeated assertions of Senator King on the floor of the Senate and in the minority committee report that the Miller-Tydings Amendment would have the very effect which this Court now says Congress did not intend it to have. The opinion brushes aside these assertions of Senator King as "fears and doubts of the opposition". No significance is given to the fact that neither Senator Tydings nor any other participant in the debate challenged the correctness of Senator King's assertion as to the scope and effect of the legislation. Thus, again the Court denies its own prior ruling that effect is to be given to a failure to challenge an assertion by a committee member; see *C. M. St. P. & P. R. R. Co. v. Acme Fast Freight*, 336 U. S. 465, 475 (1949).

(9) The Court brushes aside House Report 382, 75th Congress, 1st Session, and the statement by Representative Dirksen as a member of the Conference Committee on H. R. 7472 by merely saying "but we do not take these remarks at face value". The Court endeavors to find support for this position by the circumstance that H. R. Rep. 382 was made upon a bill which departed from the language of the Miller-Tydings Amendment in that it contained a reference to "other conditions". The omission of this reference in the Miller-Tydings Amendment was clearly without significance. As Judge Borah said in *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 926, 927:

"Since the present controversy relates wholly to prices, the omission of the words 'other conditions' from the measure as finally enacted could not possibly have a bearing upon the present issue."

The opinion of the Court does not undertake to meet the observation, merely saying that the circumstance "stirs a doubt" without assigning any substantial reason for doubt.<sup>3</sup>

That Congress understood the Miller-Tydings Amendment to be identical in substance insofar as the point here involved is concerned, with H. R. 1611, to which H. R. Rep. 382 was addressed, is shown by the fact that the Senate Committee Report on H. R. 7472 recites that the portion of that bill which became the Miller-Tydings Amendment "*incorporates the provisions of S. 100.*"<sup>4</sup> S. 100 was identical with H. R. 1611, with which H. R. Rep. 382 dealt. *Thus the Miller-Tydings Amendment was presented to Congress as the same legislative proposal which had been previously embodied in H. R. 1611, which was the subject of H. R. Rep. 382.*

It is not a proper exercise of the judicial function to lay aside legislative material on the theory that the members of Congress did not know what they were talking or thinking about, when they said that the Miller-Tydings Amendment was identical with H. R. 1611 and S. 100. The refusal by the Court to take the remarks contained in H. R. Rep. 382 at their full value because of the Court's doubt as to the identity between H. R. 1611, to which the Committee's report was addressed, and Title VIII of

<sup>3</sup> Room for doubt is no guide in the interpretation of the statutes; as this Court said in *Trailmobile Co. v. Whirls*, "the interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." (331 U. S. 40, 61)

<sup>4</sup> S. Rep. 879, Part 1, p. 5, 75th Cong., 1st Sess.

H. R. 7472, which became the Miller-Tydings Amendment, is equivalent to undertaking to reconstruct the mental processes of the Representatives who were speaking so as to inject into them doubts which there is no basis for thinking that the speakers actually entertained and which indeed are proven not to have been entertained by the statements made in the Committee report as to the identity of the bills.

The Court not only refuses to give weight to H. R. Rep. 382, but it also denies any effect to the statement of Representative Dirksen, a House Conferee on the Miller-Tydings Amendment, who reported the results of the conferences on that Amendment, in the final stage of its legislative history. Yet Representative Dirksen's statement itself identifies the Miller-Tydings Amendment with H. R. 1611 and the reasons which he gave in support of the Miller-Tydings Amendment completely negative any inference to be drawn from the omission of the words "or other conditions."<sup>5</sup>

The dropping of the words "or other conditions", when this Committee incorporated this legislative proposal in H. R. 7472 as Title VIII, obviously did not implant in the mind of Senator King (a member of the Committee and an opponent of the legislative proposal) any such "doubt" as is expressed in the opinion. He proceeded with his vigorous opposition to the legislative proposal, primarily on the reiterated assertion that it meant resale price maintenance enforcement against non-signers.<sup>6</sup> It is beyond dispute that the House debate on the final passage of Title VIII of H. R. 7472 is part and parcel of the legislative history of the Miller-Tydings Amendment, and a judicial

<sup>5</sup> 81 Cong. Rec. 8138.

<sup>6</sup> S. Rep. No. 879, Part 2, p. 6, 75th Cong., 1st Sess.; 81 Cong. Rec. 7490-7492.

determination otherwise is as unwarranted as would be an attempt to revise and rewrite the Congressional Record itself.

The same comments also apply to the progress of Title VIII of H. R. 7472 through the Senate after the favorable Committee report. This period, undoubtedly a part of the history of this legislation in its final form, includes the minority report of Senator King<sup>7</sup> and his opposing argument on the Senate floor,<sup>8</sup> both expressing at length his unchallenged and uncontradicted assertions that the proposed legislation would make resale price maintenance enforceable against non-signers under State Fair Trade Acts.<sup>9</sup> When all the Senate and House material on final passage of Title VIII of H. R. 7472 is read and considered together,<sup>10</sup> a clear case is obviously made of a "common agreement upon the general purposes"<sup>11</sup> of the Miller-Tydings Amendment, to turn the subject over to the States and to "back up" and make fully enforceable the laws which they had enacted.

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<sup>7</sup> S. Rep. No. 879, Part 2, 75th Cong., 1st Sess.

<sup>8</sup> 81 Cong. Rec. 7490-7493.

<sup>9</sup> On page 5 of its opinion the Court refers to the effect of the non-signer provisions in cases where a distributor executes a contract with a single retailer. This is the same argument which Senator King specifically used in his minority report and again in his argument on the Senate floor against the Miller-Tydings Amendment. The Senate rejected Senator King's argument. This Court now adopts the argument and makes its view prevail over that of the majority of Congress. See 81 Cong. Rec. 7491 and Senate Report 879, Part 2, page 6, 75th Cong., 1st Sess.

<sup>10</sup> and laying aside all prior legislative material on grounds of "doubt" as to its pertinency to the final enactment.

<sup>11</sup> *United States v. San Francisco*, 310 U. S. 16 (1940), footnote 10, page 22.

(10) The Court attributes the absence of any specific reference to non-signer provisions in the Miller-Tydings Amendment to a desire to follow the provisions of the Kelly-Capper bill which had failed to carry in the preceding session of Congress. The argument ignores the fundamental difference between the character of the Kelly-Capper bill and that of the Miller-Tydings Amendment. The Kelly-Capper bill proposed a uniform *federal* rule of substantive law. If such a rule had been adopted express non-signer provisions would have been required since without them in a uniform federal law no basis would have existed to make resale price maintenance obligatory against non-signers in transactions affecting interstate commerce. But the Miller-Tydings Amendment took an entirely different approach. As Senator Tydings declared, it did not set up any uniform federal rule, not even one enforceable against actual signers. It was solely an *enabling act* and its obvious purpose, both on its face and as demonstrated by its legislative history, was to leave to the states the sole subject of resale price maintenance on identified commodities in fair and open competition with commodities of the same general class produced by others. In such an enabling act which validated State Acts no references to the possibly varying provisions of State Acts as to signers or non-signers were required or, indeed, appropriate.

(11) The opinion is clearly erroneous in reciting that the Louisiana Fair Trade Act sanctions the fixing of maximum as well as minimum prices. The statement to this effect in the opinion is directly in the teeth of the decision of the Supreme Court of Louisiana in *Pepsodent Co. v. Krauss Co.*, 209 La. 959, 967-8.

(12) The opinion quotes at page 10 the reference in the Senate Report on H. R. 7472 to the "permissive" nature of the State Laws. This characterization was used by the Supreme Court of Wisconsin in upholding the Fair Trade Act of that State, which contained non-signer provisions. See *Weco Products Company v. Reed Drug Company*, 225 Wis. 474, 486, 487. It is correctly used since the Fair Trade Acts do not compel a manufacturer to establish a resale price and the case is not one of compulsory price fixing.

(13) The opinion of the Court entirely ignores the official construction of the statute evidenced by the action of the Federal Trade Commission in dismissing the complaints which prior to the enactment of the Amendment it had caused to be instituted against these respondents on the theory it was an unfair trade practice to enforce resale price maintenance. See cases reported 27 F. T. C. 106, 123, 145, 162 and 186, against these respondents and others. Compare 39 F. T. C. 154. Nor does the Court refer to the official statement of the Assistant Attorney General in charge of anti-trust prosecution that the Miller-Tydings Amendment applied to non-signers.

(14) The suggestion in the concurring opinion that legislative history should not be resorted to because the materials of legislative history are not available to the average lawyer is without force under modern conditions. There is little purpose in recording Committee reports and Congressional debates if use cannot be made of them in construing the statutes. Every lawyer having occasion to deal with the federal statutes today must necessarily refer to this material wherever there is any room for argument. Photostats and other copies of the material

are readily obtained and the official material is to be found in libraries which are the accredited depositories of Congressional material throughout the country.

(15) Congress assumed no "devious route" in adopting the Miller-Tydings Amendment nor did it fail to make its purpose plain. That purpose was to validate in the field of interstate commerce the provisions of State Acts which had received legislative approval in forty-two states. For fourteen years since the adoption of the Miller-Tydings Amendment no one in official position and no one in business life has had any doubt as to what Congress intended to do.

Respectfully submitted,

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**Certificate of Counsel**

The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

**THOMAS KIERNAN**

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